Supreme Court, U.S.
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No. 95-1732

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

CITY OF PORTLAND,

Petitioner,

v.

NORTHWEST ENVIRONMENTAL ADVOCATES,
A non-profit Oregon corporation and NINA BELL,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*

The Association of Metropolitan Sewerage Agencies ("AMSA") represents wastewater treatment agencies of municipal and county governments and local separate wastewater agencies. AMSA members, of which there are one hundred fifty-seven, plus eleven associate member local governments, are owners and operators of major wastewater treatment facilities. A significant number of AMSA members own combined sanitary and storm sewer overflows ("CSOs") or stormwater facilities. National Pollutant Discharge Elimination System ("NPDES") permits issued under Section 402 of the federal Clean Water Act ("CWA"), 33 U.S.C. § 1342, are required for discharges from wastewater facilities. AMSA members are issued NPDES permits for such discharges. Many AMSA members with CSOs do not have permit effluent limitations for those discharges. Studies to develop limitations and planning for compliance with such limitations is presently proceeding under the Environmental Protection Agency's CSO Control Policy, 59 Fed. Reg. 18688 (April 19, 1994).

Failure to comply with the applicable NPDES permit can subject wastewater agencies to enforcement under Sections 309 and 505 of the CWA, 33 U.S.C. §§ 1319, 1365, resulting in fines and penalties. Allowing citizen suit enforcement of water quality standards in the absence of permit effluent limitations or limits would significantly affect AMSA member agencies.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Local governments with publicly owned sewage or wastewater treatment facilities (publicly owned treatment works or "POTWs") are issued permits for the discharge of these facilities to waterbodies under the federal Clean Water Act National Pollutant Discharge Elimination System ("NPDES"). 33 U.S.C. § 1342 (§ 402). NPDES permits, issued by the Environmental Protection Agency ("EPA" or "Agency") or states delegated permit responsibility by EPA, contain numeric effluent limitations for amounts and concentrations of identified constituents. These numeric limits are used to plan and design treatment facilities complying with those permit limitations.

Effluent limits are necessary to implement water quality standards established by states under § 303 of the CWA, 33 U.S.C. § 1313. Attainment of water quality standards requires compliance actions by those sources discharging to a waterbody. POTWs nationwide as well as EPA and the states, have relied on this statutory scheme established by Congress, to comply with the CWA, and thereby avoid enforcement action.

Citizen suit enforcement of water quality standards alone, rather than of permit effluent limits, for CSO discharges: (1) is not authorized by the CWA regulatory scheme for wastewater discharges, and (2) would not provide constitutionally required fair notice to POTWs of what these local agencies must do to assure that treatment works comply with the law.

The decision of the court below would allow citizen suit enforcement of water quality standards alone against local governments with CSOs. The Association of Metropolitan Sewerage Agencies *amicus curiae*, with the consent of the parties, submits this brief to demonstrate the importance of this question of federal law to local governments throughout the United States with POTWs, and to respectfully urge this Court to grant the City of Portland's petition.

ARGUMENT

I. UNDER THE CLEAN WATER ACT, LOCAL GOVERNMENT POTWs RELY ON EFFLUENT LIMITATIONS TO DETERMINE THE ACTIONS NECESSARY TO ATTAIN WATER QUALITY STANDARDS.

The Clean Water Act[1] provides for issuance of effluent limitations in NPDES permits to implement water quality standards. Dischargers have relied on these limitations to conform their compliance actions to the requirements of the law. To allow enforcement of water quality standards in the absence of effluent limitations is a fundamental change which would have serious consequences for POTWs and create unnecessary conflict in the law among the circuits.

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[1] 33 U.S.C. §§ 1251-1376 (§§ 101-517).

The CWA establishes the relationship between water quality standards and wasteload allocations resulting in enforceable permit limitations to implement such standards. CWA section 301(a), establishes the authority for enforcing effluent limitations in making "unlawful" the discharge of pollutants

> [e]xcept as in compliance with this section [301 effluent limits], and sections 302 [water quality-related effluent limits], 306 [national standards of performance], 307 [toxic and pretreatment effluent limits], 318 [aquaculture], 402 [National Pollution Discharge Elimination System], and 404 [permits for dredged or fill material].

33 U.S.C. § 1311(a) (referencing §§ 1312, 1316, 1317, 1328, 1342, and 1344). Section 303 (water quality standards and implementation plans) is not included in this list. 33 U.S.C. § 1311(a) (§ 301(a)).

Section 301(b) of the CWA provides in part,

> In order to carry out the objective of this Act there shall be achieved -- ... (1)(C) not later than July 1, 1977, any more stringent *limitation, including those necessary to meet water quality standards....*

33 U.S.C. § 1311(b)(1)(C) (emphasis added).

"Effluent limitation" is defined under § 502(11) of the CWA as:

> . . . any restriction established by a State or the Administrator on *quantities, rates, and concentrations* of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

33 U.S.C. § 1362(11) (emphasis added). In establishing restrictions on "quantities, rates, and concentrations" in NPDES permits for individual discharges, these limitations implement ambient water quality standards. *Id.*

The authority of states, or EPA under certain conditions, to establish water quality standards is provided in Section 303 of the CWA. 33 U.S.C. § 1313. Section 303(d)(1)(C) provides:

> (C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge

> concerning the relationship between effluent limitations and water quality.

33 U.S.C. § 1313(d)(1)(C).

While section 505(a)(1) of the CWA authorizes citizens to bring civil actions against any person:

> . . . who is alleged to be in violation of (A) an effluent standard or limitation under this Act [or] (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

nothing in this section includes enforcement of water quality standards alone. 33 U.S.C. § 1365(a)(1).

EPA regulations at 40 C.F.R. § 122.44 (1995) require NPDES permits to include technology-based effluent limitations, controls, and standards. Section 122.44(d) (1995) also allows for the application of more stringent requirements to meet state narrative criteria for water quality, but that same section references limitations to achieve these goals. 40 C.F.R. § 122.44(d)(1)(i) (1995).

In addition, the EPA's Combined Sewer Overflow Control Policy establishes a:

> . . . consistent national approach for controlling discharges from CSOs to the Nation's waters through the National Pollution Discharge Elimination System (NPDES) permit program.

EPA Combined Sewer Overflow Control Policy, 59 Fed. Reg. 18688, 18688 (April 19, 1994). While the 1994 Policy was not in existence during the events in the instant case, it represents EPA's judgement as to what is necessary to regulate CSOs under NPDES permits. The Policy states the relationship between water quality standards and NPDES permit limits:

> Coordinating the development of the long-term CSO control plan and the review of the WQS and implementation procedures provides greater assurance that the long-term control plan selected and the limits and requirements included in the NPDES permit will be sufficient to meet WQS and to comply with sections 301(b)(1)(C) and 402(a)(2) of the CWA.

EPA CSO Control Policy, 59 Fed. Reg. at 18694. Thus, the statutory and regulatory authorities, on which local government POTWs rely, provide for discharge requirements in the form of effluent limitations in permits.

If the Ninth Circuit's ruling in *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979 (1995) ("*NWEA II*"), is allowed to stand, the result would have a significant impact on the cities and municipalities within that circuit with CSOs and could be persuasive to other courts. Such result would be costly to limited local resources and would lead to regulatory uncertainty for CSOs under the CWA.

Courts which have considered the question of citizen suit enforcement of state water quality standards apart from numerical effluent limitations in an NPDES permit, have declined separate enforcement of those standards. *See Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842 (9th Cir. 1987); *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 707 F. Supp. 1182 (E.D. Cal. 1988), *cert. denied*, ___ U.S. ___, 116 S.Ct. 51 (1995); *New York State v. United States*, 620 F. Supp. 374 (E.D. N.Y. 1985); *Save Our Community v. United States Envtl. Protection Agency*, 971 F.2d 1155 (5th Cir. 1992); *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984).

The ruling in *NWEA II* is also in conflict with the Second Circuit Court of Appeals decision in *Atlantic State Legal Foundation v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993), *cert. denied*, ___ U.S. ___, 115 S.Ct. 62 (1994), which held that:

> . . . state regulations, including the provisions of SPDES [State Pollution Discharge Elimination System] permits, which mandate 'a greater scope of coverage than that required' by the federal CWA and its implementing regulations are not enforceable through a citizen suit under 33 U.S.C. § 1365.

Id. at 359 (citations omitted). The reasoning encompassed in this line of cases is consistent with the statutory scheme and should be upheld.

In allowing a citizen suit to enforce water quality standards, *NWEA II* also contravenes the CWA's "permit as a shield" provision of 33 U.S.C. § 1342(k) (§ 402(k)), on which local government permitees rely. Permit effluent limitations provide an objective requirement, violations of which can be readily determined. By blurring the distinction between water quality standards (33 U.S.C. § 1313 (§ 303)) and effluent limitations (33 U.S.C. § 1311 (§ 301)), the decision in *NWEA II* would allow federal courts to interpret and enforce water quality standards.

II. CITIZEN SUIT ENFORCEMENT OF WATER QUALITY STANDARDS ALONE VIOLATES CONSTITUTIONAL FAIR NOTICE REQUIREMENTS.

Permits without effluent limitations do not provide a discharger with constitutional fair notice as to the actions necessary to comply with the law. Water quality standards -- which describe ambient water quality uses and criteria for the entire water body -- alone do not provide such notice because they do not inform individual point sources of the quantities, rates, and concentrations of constituents that may be discharged. Without such notice, local POTWs should be held harmless from penalties.

This Court has stated numerous times that before a penalty can be assessed, a person must have notice of the prohibited action(s) which would justify that penalty. The issue is fundamental, involving the requirements of due process. Where "the proceeding

is one in which [a party] may be deprived of property rights . . . notice and hearing must measure up to the standards of due process." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). *See also Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966)

> (It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. . . .);

Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961)

> ('. . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.')

This Court has also stated that in determining whether a statutory provision is "void for vagueness," a court is ". . . permitted to consider the warning . . . not only in terms of the statute 'on its face' but also in the light of the conduct to which it is applied." *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 36 (1963). In this case, discharge control requires significant facility engineering and construction decisions. Therefore, since water quality standards by their very nature are not limitations on amounts, rates, and concentrations of constituents for individual

discharges, they do not provide fair notice of what is required to control such discharges.

In the absence of constitutional fair notice, a party may not be deprived of property by imposing criminal or civil liability. Although this rule is commonly applied in the criminal context, it is now a generally accepted tenet of regulatory law. *See United States v. Mersky*, 361 U.S. 431, 441 (1960) (analyzing a regulation and statute in a criminal prosecution and holding ". . . businessmen must not be left to guess the meaning of regulations").

The direction of this Court has been followed by the Courts of Appeals in the following cases. *See General Elec. Co. v. United States Envtl. Protection Agency*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995)

> (Due process requires that parties receive fair notice before being deprived of property. . . . In the absence of notice -- for example, where the regulation is not sufficiently clear to warn a party about what is expected of it -- an agency may not deprive a party of property by imposing civil or criminal liability.);

Radio Athens, Inc. (WATH) v. Federal Communications Comm'n, 401 F.2d 398, 404 (D.C. Cir. 1968) (holding that ". . . full and explicit notice is the heart of administrative fairness"); *Diamond Roofing Co. v. Occupational Safety and Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976) (holding that ". . . a regulation cannot be construed to mean what an

agency intended but did not adequately express"); *McElroy Elecs. Corp. v. Federal Communications Comm'n*, 990 F.2d 1351, 1353 (D.C. Cir. 1993)

> (An agency cannot ignore its primary obligation to state its directives in plain and comprehensive English. When it does not live up to this obligation, we will not bind a party by what the agency intended, but failed to communicate.)

Courts require that upon a "fair reading," the regulated party knows or should know what is expected. *McElroy Elecs. Corp.*, 990 F.2d at 1358. "Otherwise the practice of administrative law would come to resemble 'Russian Roulette.'" *Satellite Broadcasting Co. v. Federal Communications Comm'n*, 824 F.2d 1, 4 (D.C. Cir. 1987). The standard in CWA citizen suits should be the same.

The state regulators in the instant case decided that the issuance of the permit and the decision not to undertake an enforcement action were proper regulatory decisions. As this Court has stated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . ." The *Chevron* Court went on to say,

> In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing

> interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.

Id. at 865 (internal footnote citations omitted). That is what the state regulators did in the present case in issuing Petitioner's discharge permit.

Several factors combined to assure Petitioner that it was not in violation of the NPDES permit: (1) The state had approved the NPDES permit which included CSOs but no effluent limitations; (2) the state did not seek enforcement of the permit in question; and (3) the prevailing understanding of the law surrounding the CWA has been that permit enforcement actions are based upon violation of effluent limitations.

In the instant case, the NPDES permit itself set no effluent limitations on CSOs which would serve as a basis for planning, designing, and constructing control facilities. Water quality standards alone do not inform a discharger of what is needed to conform their activities to the requirements of the law, such as construction of facilities or other actions. Therefore, it is difficult to conclude that Petitioner had fair notice of what would constitute a violation of the permit so that it could take necessary measures to avoid a penalty.

To uphold the Ninth Circuit's decision in *NWEA II* is to turn current principles involving enforcement of CWA provisions on their heads. As the Fifth Circuit held in *Diamond Roofing Co.*,

> . . .[S]tatutes and regulations which allow monetary penalties against those who violate them . . . must give . . . fair warning of the conduct it prohibits or requires, and *it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.*

528 F.2d at 649 (emphasis added).

If applied nationwide, *NWEA II* would threaten the stability and certainty under the CWA associated with limiting enforcement actions to violations of effluent limitations in NPDES permits. Water quality standards alone do not suffice to provide local governments fair notice of what they must do to conform their conduct to the requirements of the law. Based on the foregoing, the Ninth Circuit's decision in *NWEA II* should be overturned.

CONCLUSION

For the reasons set forth above, *amicus curiae* respectfully requests that the Court grant the City of Portland's petition for writ of *certiorari*.

Respectfully submitted,

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